

A Long Term Care and Senior Housing Law Update

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Less Freedom for Employers to Contract: the Oregon Legislature Toughens Laws on Noncompete Agreements

On August 6, Governor Ted Kulongoski signed Senate Bill 248 into law, making more onerous the requirements for a valid noncompetition agreement between employers and their employees. Oregon law now makes noncompete agreements voidable unless all of the following four requirements are met:

1. The employer informs the employee that a signed non-compete agreement is a required condition of employment. This notification must be given to the employee in a written employment offer at least two weeks before the employee's first day of work.
2. The employee is an individual engaged in administrative, executive, or professional work who: (a) performs predominately intellectual, managerial or creative tasks; (b) exercises discretion and independent judgment; and (c) is paid on a salary basis.
3. The employer has a "protectable interest." A protectable interest means either (a) has access to trade secrets; (b) has access to competitively sensitive confidential business or professional information (i.e., product development plans, product launch plans, marketing strategy or sales plans); (c) on-air talent.
4. The total amount of employee's gross salary and commissions on an annual basis at the time of termination exceeds the median family income for a family of four as determined by the United States Census Bureau.

The new legislation also contains a somewhat ambiguous provision. The bill provides that a noncompetition agreement is enforceable for up to two years, notwithstanding the employee's position or annual compensation if the employer continues to pay the employee — for the full term of the agreement — either (a) 50 percent of the employee's annual gross salary and commissions at the time of the employee's termination, or (b) 50 percent of the median family income as set by the U.S. Census Bureau, whichever is greater.

It is not yet clear how this provision will be interpreted. As written, this provision appears to indicate that a noncompete agreement may still be valid even if the employee is not an "individual engaged in administrative, executive, or professional work," and is not paid at least the median income for a family of four, if the employer continues to provide compensation to the employee for the term of the noncompete agreement. However, the other two requirements for a valid noncompete — notification and a "protectable interest" — must still be in place.

One positive for employers in the new law is that the requirements do not apply to a covenant not to solicit employees of the employer, or solicit or transact business with customers of the employer. Employers can still have their employees sign these covenants as long as they are separate from the noncompete agreements.

The effective date for this legislation is January 1, 2008.

What Senate Bill 248 Means For Employers.

The employer should notify the employee that a signed non-compete agreement is required in a written offer of employment at least two weeks before the employee's initial start date, or before an employee's bona fide promotion.

For employers who are promoting an employee into a position where a noncompete agreement is necessary, a signed noncompete agreement can be valid if it is entered upon a bona fide advancement. The safest course for employers would be to offer the new position to an employee in writing, at least two weeks before the employee begins the new position, stating that the noncompete agreement is a requirement of the promotion.

This law will only apply to agreements signed after the effective date of this law. Because of the more onerous requirements of the new law, employers will need to make sure to review their noncompetition agreements and work with legal counsel to review their current policies regarding noncompete agreements to ensure that they conform to the new requirements.

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